

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

EASY SPIRIT, LLC,

Plaintiff,

v.

SKECHERS U.S.A., INC. and
SKECHERS U.S.A., INC. II,

Defendants.

Case No. 1:19-cv-03299-WHP

**DEFENDANTS SKECHERS U.S.A., INC. AND SKECHERS U.S.A., INC. II'S
LOCAL RULE 56.1 STATEMENT OF UNDISPUTED MATERIAL FACTS IN
SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 56.1, Defendants Skechers U.S.A., Inc. and Skechers U.S.A., Inc. II (collectively “Skechers” or “Defendants”), by and through their undersigned counsel, respectfully submit this Statement of Undisputed Material Facts in support of their Motion for Summary Judgment, filed concurrently herewith.

A. The Parties and the Shoes at Issue

1. In 2004, Plaintiff Easy Spirit, LLC’s (“Easy Spirit” or “Plaintiff”) predecessors-in-interest introduced the Traveltime shoe, which is a light-weight slip-on mule style with an open back “designed for maximum comfort and easy wearing.” Compl., Dkt. 1 at ¶ 8-10.

2. In 2014, the Traveltime brand name was registered as a trademark on the Principal Register of the U.S. Patent and Trademark Office, under U.S. Registration No. 4,505,161. Compl., Dkt. 1 at ¶ 19; Compl. Ex. 6.

3. Skechers is an award-winning global brand with a focus on lifestyle and performance footwear products. Declaration of Jessica Baruch (“Baruch Dec.”) at ¶ 5.

4. Skechers designed its “Commute” shoe in 2017 and introduced the shoe to consumers in early February 2018. Exhibit A to Declaration of Emily C. Welch (“Welch Dec.”) (Deposition Transcript of Melissa Hobbs (“Hobbs Depo. Tr.”)) at 73:7-19; Welch Dec. Ex. B (Rule (30(b)(6) Deposition Transcript of Skechers U.S.A., Inc. Designee Savva Teteriatnikov (“Teteriatnikov Depo. Tr.”)) at 98:16-22; Welch Dec. Ex. C; Baruch Dec. at ¶¶ 6, 9.

5. The Skechers Commute shoe is a sporty, open-back style shoe in the company’s Modern Comfort line. Welch Dec. Ex. D (Deposition Transcript of KariAnne Spear (“Spear Depo. Tr.”)) at 34:22-35:7; Welch Dec. Ex. B (Teteriatnikov Depo. Tr.) at 96:12-24.

6. Since launch through June 15, 2020, Skechers has sold [REDACTED] of accused Skechers Commute or Skechers Commute Time shoes through its eCommerce website, Skechers retail stores, and wholesale channels, including third-party retail stores and eCommerce websites. Welch Dec. Ex. E.

7. Skechers changed the name of the Skechers Commute shoe to the Skechers Commute Time shoe on skechers.com on September 25, 2018. Welch Dec. Ex. F; Welch Dec. Ex. G. A box bearing the Commute Time logo was implemented on April 1, 2019. *See, e.g.* Welch Dec. Ex. H; Welch Dec. Ex. I. Those new boxes reflecting that name change first shipped on June 25, 2019. Baruch Dec. at ¶ 10.

B. The Claimed Easy Spirit Traveltime Trade Dress

8. Easy Spirit claims the elements of the Traveltime trade dress are: (1) a slip-on, clog-style upper; (ii) a distinctive “swirl” mid-sole that runs from the base of the toe cap, gradually widening as it flows to the heel; (iii) an indented curved line along the midsole from the front to the heel; another indented line on the rear of the shoe; (iv) a combined contoured midsole/outsole with an arch that creates an open area between the outsole and heel; (v) the

rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (vi) four circular design elements on the midsole at the heel segment. Compl., Dkt. 1 at ¶ 21.

9. A swirl midsole, where the midsole is narrower or shorter in height at the toe bed compared to the heel, increasing between the point of the toe and the ball of the foot, dropping down at the arch, and raising back up at the heel, is typical on athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Rule 30(b)(6) Deposition Transcript Easy Spirit Designee, Design Director Henry Besanceney, III (“Besanceney Depo. Tr.”) at 147:7-149:5; 236:2-8.

10. A toe bumper like the one on the Traveltime shoe is common in athletic sneaker type shoes. Welch Dec. Ex. K (Rule 30(b)(6) Deposition of Easy Spirit Designee, Senior VP of Product Design and Development Mark DeZao (“DeZao Depo. Tr.”) at 194:8-196:4.

11. A toe bumper, as part of a shoe’s outsole, contributes to the shoe’s slip resistance. Welch Dec. Ex. J (“Besanceney Depo. Tr.”) at 134:14-136:16.

12. Easy Spirit does not claim proprietary rights in any particular shoe color or shoe upper pattern. Welch Dec. Ex. L (August 3, 2020 Hearing Tr.) at 15:17-21.

C. The Design of the Traveltime Shoe

13. Easy Spirit claims that it and its predecessors in interest have continuously marketed the Traveltime shoe since 2005. Welch Dec. Ex. M (Easy Spirit’s Amended Objections and Responses to Skechers’ Second Set of Interrogatories, Interrogatory Response Nos. 11, 24).

14. Plaintiff Easy Spirit LLC was formed in 2016 to acquire the trademark rights and certain other assets of the Easy Spirit business from Nine West Holdings. Compl., Dkt. 1 at ¶ 9; Welch Dec. Ex. N (Burris Depo. Tr.) at 274:14-281:4.

15. Mr. Henry Besanceney, Easy Spirit's Design Director, considers the Easy Spirit Traveltime shoe as an athleisure shoe, a mule with no back, an EVA midsole with four dots, a shape, midsole design recesses and rubber outsole. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 30:9-15, 70:11-71:20; 87:15-18. When describing a shoe as a "Traveltime look-alike" or family member, Mr. Besanceney identified design elements on the upper that included the toe tip, the V panel or gore on the side where the foot enters the shoe and the stitching across the vamp, or part of the shoe that covers the top of the foot. Mr. Besanceney described this Easy-Spirit produced shoe as a Traveltime look-alike or Traveltime family member even though the shoe was not on the Traveltime sole construction. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 205:19-206:17.

16. Mr. DeZao described the Easy Spirit Traveltime shoe as an open-back slide with "a particular upper design," "upper side panel vents," "distinctive details on the midsole, on the outsole and on the way the shoe was constructed and put together." Welch Dec. Ex. K (DeZao Depo Tr.) at 50:6-51:17.

17. As shown in the photos below of Easy Spirit's produced specimens, the Traveltime shoe bears the EASY SPIRIT house mark on the insole of the shoe and a cursive "e" logo on the bottom of the outsole. *See, e.g.,* Welch Dec. Ex. O.



18. The Traveltime shoe does not bear the TRAVELTIME word mark anywhere on the shoe. *See, e.g., id.*

19. Easy Spirit's shoe designers look at and sometimes purchase competitor or other companies' shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 87:19-88:15.

20. Easy Spirit uses competitor and other companies' shoes to gather information about trending colors, materials, and silhouettes when designing shoes and the upper concepts. Welch Dec. Ex. K (DeZao Depo. Tr.) at 124:3-127:6.

D. The Design of the Skechers Commute Time Shoe

21. Savva Teteriatnikov ("Mr. Teteriatnikov") is Vice President of Design at Skechers U.S.A., Inc. and designs sport shoes, casual shoes, men's and women's shoes, and children's shoes. Welch Dec. Ex. B (Teteriatnikov Depo. Tr.) at 28:10-21; Declaration of Savva Teteriatnikov ("Teteriatnikov Dec.") at ¶¶ 2, 4. Mr. Teteriatnikov has designed footwear for over twenty years for such companies as Lugz, British Knights, Polo Ralph Lauren, Tommy Hilfiger, and now Skechers. Teteriatnikov Dec. at ¶ 4.

22. Jessica Baruch ("Ms. Baruch") is Senior Director of Merchandising and Product Development at Skechers U.S.A., Inc., and manages five product divisions for Skechers, including Modern Comfort, Modern Comfort Sandals, Modern Comfort Boots, Cali, and Active. Welch Dec. Ex. P (30(b)(6) Deposition Transcript of Skechers Designee Jessica Baruch ("Baruch Depo. Tr.)) at 17:13-14; 18:14-20; Baruch Dec. at ¶¶ 2, 4.

23. The average customer for Skechers Modern Comfort shoes, including the Skechers Commute Time, is a younger, sophisticated woman, aged 40 to 60, who is interested in stylish yet comfortable footwear. Baruch Dec. at ¶ 23. In Ms. Baruch's experience designing and offering shoes for that market, and meeting and discussion shoes with Skechers' retail account customers (like DSW and other national retailers), purchasers of Skechers Modern Comfort shoes are discerning and thoughtful in making their purchase decisions. Baruch Dec. at ¶ 23.

24. With a retail price point of \$35.00 to \$60.00, Skechers Modern Comfort shoes are not inexpensive, and are not considered an impulse purchase by consumers. Baruch Dec. at ¶ 23.

25. In early 2017, Ms. Baruch made the decision to offer a new open-back shoe in the Modern Comfort division. Baruch Dec. at ¶ 6. Ms. Baruch wanted to launch a shoe inspired by the Skechers' D'Lite shoe, a popular line of shoes for Skechers, with various individual styles offered in different shoe divisions. Baruch Dec. at ¶ 6; Welch Dec. Ex. P (Baruch Depo. Tr.) at 48:6-49:13.

26. Ms. Baruch wanted to tie the new Modern Comfort open-back to the Skechers D'Lite, using features like the D'Lite "chicklets" – small inserts in the shoe's midsole – to help promote the new shoe as a Skechers offering. Baruch Dec. at ¶ 7; Welch Dec. Ex. P (Baruch Depo. Tr.) at 48:6-49:13.

27. Mr. Teteriatnikov was the lead designer for the shoe that became the Skechers Commute. Welch Dec. Ex. B (Teteriatnikov Depo. Tr.) at 98:16-18; 46:4-16. He designed the shoe sole (the hard, bottom of the shoe) and an initial upper (the cloth or other material on top of a shoe) for the Skechers Commute. Welch Dec. Ex. B (Teteriatnikov Depo. Tr.) at 103:21-107:6; Teteriatnikov Dec. at ¶¶ 5-6.

28. Based on his discussions with Ms. Baruch, Mr. Teteriatnikov designed the outsole and midsole that became the Skechers Commute shoe as a Spring offering for the women's Modern Comfort line. Welch Dec. Ex. B (Teteriatnikov Depo. Tr.) at 98:19-99:23; 101:8-102:19; Teteriatnikov Dec. at ¶¶ 5-8.

29. Mr. Teteriatnikov purposefully included the Skechers D'Lite "chicklets" design element on the side of the outsole that became the Skechers Commute Time shoe so as to

specifically associate the Skechers Commute Time with other Skechers footwear. Welch Dec. Ex. B (Teteriatnikov Depo. Tr.) at 96:18-24; 165:12-166:18; Teteriatnikov Dec. at ¶¶ 14, 22.

30. Mr. Teteriatnikov was also inspired by historic Skechers shoes, many open back, such as the Synergy, Biker, Reggae Fest, Easy Living, Easy Going, Noogies, D'Lite, Energy, and Prequel. Welch Dec. Ex. B (Teteriatnikov Depo. Tr.) at 101:11-103:15; 104:7-19; 125:10-21; 235:2-12; 240:12-22; 243:10-244:9; 245:3-18; Teteriatnikov Dec. at ¶¶ 9-24.

31. In designing the outsole and midsole for the shoe that would later become the Skechers Commute, Mr. Teteriatnikov was inspired by numerous previous third-party shoes, including a shoe he designed for Tommy Hilfiger in 2002. Teteriatnikov Dec. at ¶¶ 10-12, 15; Welch Dec. Ex. Q; Welch Dec. Ex. R.

32. Based on these inspirations, Mr. Teteriatnikov finalized the design of an athleisure outsole and midsole featuring a mid-height profile, a toe bumper, and stylized lines on the side. Teteriatnikov Dec. ¶¶ 10-13; Welch Dec. Ex. DK.

33. Skechers offers shoes of three differing sole heights within the Modern Comfort division: a thicker sole, a thinner sole, and an in-between sole. Teteriatnikov Dec. at ¶ 9; Welch Dec. Ex. B (Teteriatnikov Depo. Tr.) at 101:8-103:15. Mr. Teteriatnikov intended the sole that became the Skechers Commute to be an in-between height, given thicker and thinner open-back shoes already in the Modern Comfort division. Teteriatnikov Dec. at ¶ 9; Welch Dec. Ex. B (Teteriatnikov Depo. Tr.) at 101:8-103:15.

34. Mr. Teteriatnikov reviewed a Travelttime shoe that was in the Skechers office as a reference of a mid-height athletic shoe. Welch Dec. Ex. B (Teteriatnikov Depo. Tr.) at 171:1-173:5; Teteriatnikov Dec. at ¶ 13. Rather than provide measurements in his communications with Skechers' manufacturing partners in China, he sent along the Travelttime shoe so it could be

measured on site for outsole width and midsole height measurements. Welch Dec. Ex. B (Teteriatnikov Depo. Tr.) at 171:1-173:5. Sending along this store-bought reference shoe saved Mr. Teteriatnikov time in his initial design process because the team in China could take the measurements that he could not as easily take. Teteriatnikov Dec. at ¶ 13.

35. Mr. Teteriatnikov had already finalized his initial outsole designs for the sole that became the Skechers Commute prior to sending the Easy Spirit Traveltime shoe to China. Teteriatnikov Dec. at ¶ 13.

36. Neither the outsole widths nor midsole height measurements are elements of Easy Spirit's claimed Traveltime trade dress. Compl., Dkt. 1 at ¶ 21.

37. The Skechers Commute Time has a y-shaped strip of fabric, which can also be called a "yoke", on the center of the shoe's upper, printed detailing on the toe cap and along the side of the shoe, a diagonal distinct stitching pattern on the top of the upper, and no stretchy panels on the sides of the upper where the foot enters the shoe. Welch Dec. Ex. S. Exemplary images from these exhibits are depicted below at Paragraph 40.

38. The midsole "chicklets" on the Skechers Commute Time are similar to the midsole "chicklets" on the Skechers D'Lite. Welch Dec. Ex. T; Teteriatnikov Dec. at ¶ 14. The toe bumper on the outsole of the Skechers Commute Time is similar to the toe bumper on the Skechers D'Lite. Welch Dec. Ex. T; Teteriatnikov Dec. at ¶ 14. The center fabric strip, also known as the yoke, has a similar y-shape on the Skechers Commute Time as the yoke on the Skechers D'Lite. Welch Dec. Ex. T; Teteriatnikov Dec. at ¶ 13.



Image retrieved from Exhibit T to the Welch Dec., lines in the original.

39. In designing the outsole, midsole, and upper that became the Skechers Commute Time, Mr. Teteriatnikov intended to create a Skechers design with consistent design elements and the “DNA” of a Skechers shoe, and Mr. Teteriatnikov did not intend to create a shoe that was similar to the design of the Easy Spirit Traveltime. Teteriatnikov Dec. at ¶ 25.

40. The Skechers Commute Time shoe features the SKECHERS house brand repeatedly on the shoe, including printed on the top of the outsole, the heel, the outer side of the upper, and on the sock bed. *See, e.g.* Welch Dec. Ex. S (SKNY-SP001 3, SKNY-SP001 4, SKNY-SP001 6, SKNY-SP001 7) (depicted below); Baruch Dec. at ¶¶ 18-19. While all Skechers

Commute Time shoes feature the SKECHERS mark at least once, and as many as three times (displayed below), some designs, such as the Skechers Commute Time Rideshare, do not bear the SKECHERS mark in all three possible areas. Baruch Dec. at ¶¶ 18-19. The Skechers Commute Time also has an “S” logo printed on the bottom of the outsole. Baruch Dec. at ¶¶ 18-19.





41. Skechers purposefully did not put the COMMUTE or COMMUTE TIME name or mark on the shoe because Skechers wanted the shoe to be placed and promoted as part of the Skechers family of footwear. Baruch Dec. at ¶ 18.

42. KariAnne Spear (“Ms. Spear”) is a senior colorist and material developer for Skechers. Welch Dec. Ex. D (Spear Depo. Tr.) at 18:2-10. Ms. Spear designed shoe uppers and selected materials and patterns for Skechers Commute and Skechers Commute Time shoes. *Id.* at 35:12-18.

43. Skechers’ shoe designs are developed via several resources, including shopping the market, looking at trend resources such as WGSN, and seeing what consumers are wearing. Welch Dec. Ex. D (Spear Depo. Tr.) at 19:4-18; 133:16-134:17. Skechers’ designers develop upper material ideas based on market trends. *Id.* at 18:14-19:18. Skechers’ Commute Time shoes are designed using the same process as every other Skechers shoe. *Id.* at 38:22-39:3.

44. Ms. Spear did not consult any Easy Spirit Traveltime shoes before designing any Skechers Commute Time shoe uppers that were sold. Welch Dec. Ex. D (Spear Depo. Tr.) at 46:23-48:18; 203:21-204:10.

E. The COMMUTE TIME Name Selection

45. Melissa Hobbs (“Ms. Hobbs”) was a senior product manager for Skechers and was typically the person in charge of assigning style names for the Modern Comfort line of

shoes. Welch Dec. Ex. A (Hobbs Depo. Tr.) at 15:16-22; 23:4-21; 38:21-39:14. Ms. Hobbs reported to Ms. Baruch until early 2020. Baruch Dec. at ¶ 8.

46. Ms. Hobbs originally came up with the name “Commute” for what is now the Skechers Commute Time shoe. Welch Dec. Ex. A (Hobbs Depo. Tr.) at 56:21-61:3.

47. The name “Commute” was chosen to connect the new shoe to Skechers’ existing popular styles in the Modern Comfort line of shoes with walking themed names, such as the Pedestrian and Biker. Welch Dec. Ex. A (Hobbs Depo. Tr.) at 56:21-61:3.

48. Ms. Hobbs’ regular name process involves her, or members of her team, checking for prior Skechers shoes already using the name and checking trademark databases for prior relevant registrations using the name. She chose the “Commute” name using this regular process. Welch Dec. Ex. A (Hobbs Depo Tr.) at 39:15-41:16; 110:12-17; 199:9-202:13; 58:4-60:24.

49. Ms. Baruch approved the use of the name Commute for the shoe that is now the Skechers Commute Time. Baruch Dec. at ¶ 8. When approving that name, Ms. Baruch was not thinking of Easy Spirit’s Traveltime name, and she did not approve the name Commute based on anything to do with Easy Spirit. Baruch Dec. at ¶ 8.

50. The name of the shoe was changed from “Commute” to “Commute Time” in September 2018. Welch Dec. Ex. A (Hobbs Depo. Tr.) at 199:3-6; Welch Dec. Ex. F; Welch Dec. Ex. G.

51. Prior to that change, Ms. Hobbs and her sample coordinator Nick Salita sent the “Commute,” “Commute Time,” and another option, “Commuters,” to Skechers legal for approval. Baruch Dec. at ¶ 11; Welch Dec. Ex. A (Hobbs Deposition Errata Sheet (March 11, 2020)) at 232:6-9; Welch Dec. Ex. U.

52. There is a live trademark registration in International Class 25 for the mark COMMUTERS, held by Levi Strauss & Co., Reg. No. 4,595,283. Welch Dec. Ex. V.

F. Skechers' Use of the COMMUTE and COMMUTE TIME Marks

53. Skechers Commute shoe styles were, and Skechers Commute Time shoe styles are, sold in boxes that prominently feature the house brand, "Skechers," and the SKECHERS trademark. *See, e.g.* Welch Dec. Ex. S (SKNY-SP001); Baruch Dec. at ¶ 11.

54. Prior to June 25, 2019, the boxes only use the mark COMMUTE TIME or COMMUTE once, to designate the style name on the UPC label identifying the shoe information on the side of the box, underneath a top flap prominently featuring the trademark SKECHERS. Welch Dec. Ex. A (Hobbs Depo. Tr.) at 38:12-20; 75:3-6. *See, e.g.* Welch Dec. Ex. S. Baruch Dec. at ¶¶ 12-13.

55. Since June 25, 2019, a select few, newer styles of the Skechers Commute Time shoes ship in new boxes, which prominently feature the Skechers trademark above the Commute Time style name. Baruch Dec. at ¶ 13. Welch Dec. Ex. I.

56. Skechers does not market or advertise the Skechers Commute Time shoe. Welch Dec. Ex. P (Baruch Depo. Tr.) at 151:2-152:8; Baruch Dec. at ¶ 21.

57. This is because Skechers does not consider the shoe to be a big seller in its Modern Comfort line. Welch Dec. Ex. P (Baruch Depo. Tr.) at 151:2-152:8. The Skechers Commute Time shoe has been relatively unimportant for Skechers. Baruch Dec. at ¶ 21.

58. Skechers does not use the Skechers COMMUTE or Skechers COMMUTE TIME name, beyond displaying it on the shoebox, when offering the shoes for sale in Skechers retail stores. Baruch Dec. at ¶ 14. The box is the only place that a customer at a Skechers retail store

would see the Skechers Commute or Skechers Commute Time mark, and in some contexts, this would occur only after the shoe is purchased. Baruch Dec. at ¶ 14.

59. Skechers is unaware of any use of the SKECHERS COMMUTE or SKECHERS COMMUTE TIME name by third-party retailers, such as DSW and Macy's, at the point-of-sale or on the store shelf. Baruch Dec. at ¶ 16. Skechers is unaware of any point-of-sale advertising for the Skechers Commute Time shoe by third-party retailers, beyond what is available on their eCommerce pages. Baruch Dec. at ¶¶ 16-17.

60. When offered on skechers.com, Skechers' eCommerce website, the Skechers Commute and Skechers Commute time are sold under the heading banner reading SKECHERS. Welch Dec. Ex. W; Baruch Dec. at ¶ 15.

61. Many of Skechers' wholesale customers also use the famous SKECHERS mark in conjunction with the COMMUTE and COMMUTE TIME marks when offering the shoes for sale via their own respective eCommerce websites, including Kohls.com, DSW.com, QVC.com, Shoesensation.com, Amazon.com, Zappos.com, and Bealls.com. Welch Dec. Ex. X; Welch Dec. Ex. Y; Welch Dec. Ex. Z; Welch Dec. Ex. AA; Baruch Dec. at ¶ 17.

62. Certain third-party retailers continue to use the Skechers Commute name and mark for the relevant shoe, despite the name change. Baruch Dec. at ¶ 17.

63. The Skechers Commute enjoys a similar feedback to other Skechers shoes. Welch Dec. Ex. AB (Deposition Transcript of Timothy Lakin ("Lakin Depo. Tr.)) at 20:22-21:24; 40:18-42:2. Skechers shoes enjoy a roughly 95% positive customer satisfaction review rating. Welch Dec. Ex. AB (Lakin Depo. Tr.) at 20:22-21:24.

G. Skechers' History of Casual Open-Backs

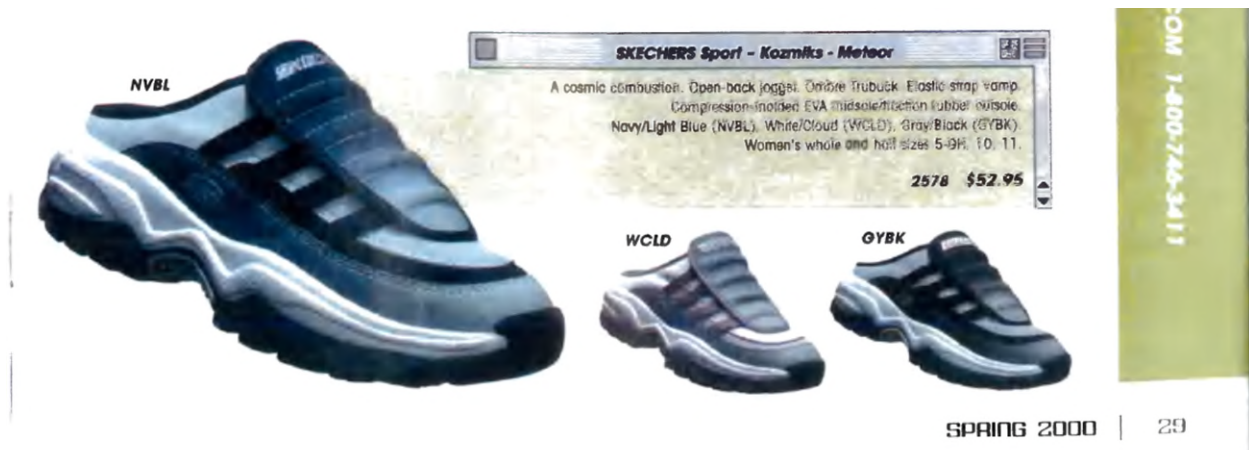
64. Skechers launched open-back athleisure shoes such as the Skechers Kozmiks, Skechers Energy, and Skechers Noogies styles, and many others, from at least 1999-2012. Welch Dec. Ex. AC (*e.g.*, Style No. 2581, the Skechers Sport Toledo Halfback, which first shipped on March 2, 2000 and sold 5,520 pairs, Style No. 5013, Skechers Sport Tectonics Tremor, which first shipped on January 28, 2000 and sold 53,435 pairs, Style No. 5093, the Skechers Sport Gators Outback, which first shipped on April 16, 2001 and sold 19,908 pairs, Style No. 5016, the Skechers Sport Tectonics, which first shipped on October 26, 2000 and sold 7,235 pairs, Style No. 1901, the Skechers Sport Gators, which first shipped on August 30, 2001 and sold 29,403 pairs, the Skechers Sport Playmates, Style No. 2451, which first shipped on November 10, 2000 and sold 84,975 pairs, the Skechers Sport Kozmiks Crater, Style No. 2665, which first shipped on December 8, 2000 and sold 149,364 pairs, and the Skechers Flex Fit Slam Dunk, Style No. 11664, which first shipped on May 4, 2012 and sold 39,891 pairs); Compl., Dkt. 1 at ¶ 10; Declaration of Neil Sadis (“Sadis Dec.”) at ¶¶ 7-15, 23, 46; Welch Dec. Exs. DD, DE DF, DG (Skechers catalogs).

65. From 1999 to 2012, Skechers introduced for sale at least 40 new styles of backless, athleisure shoes with rubber toes, swirl-style midsoles, elevated arches in the outsole/midsoles, line-like detailing elements on the midsoles, and design detailing in the midsole at or near the heel, which sold more than 5,000,000 pairs. Sadis Dec. at ¶¶ 6-48; *see also* Welch Dec. Ex. AC.

66. Easy Spirit’s 30(b)(6) witness and Design Director Mr. Besanceney admitted that several Skechers shoes predating the Skechers Commute Time possessed the claimed Traveltime

trade dress elements, including Skechers' Kozmiks, Achilles, Energy, Tattle Tales, and Noogies. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 145:20-192:9-11.

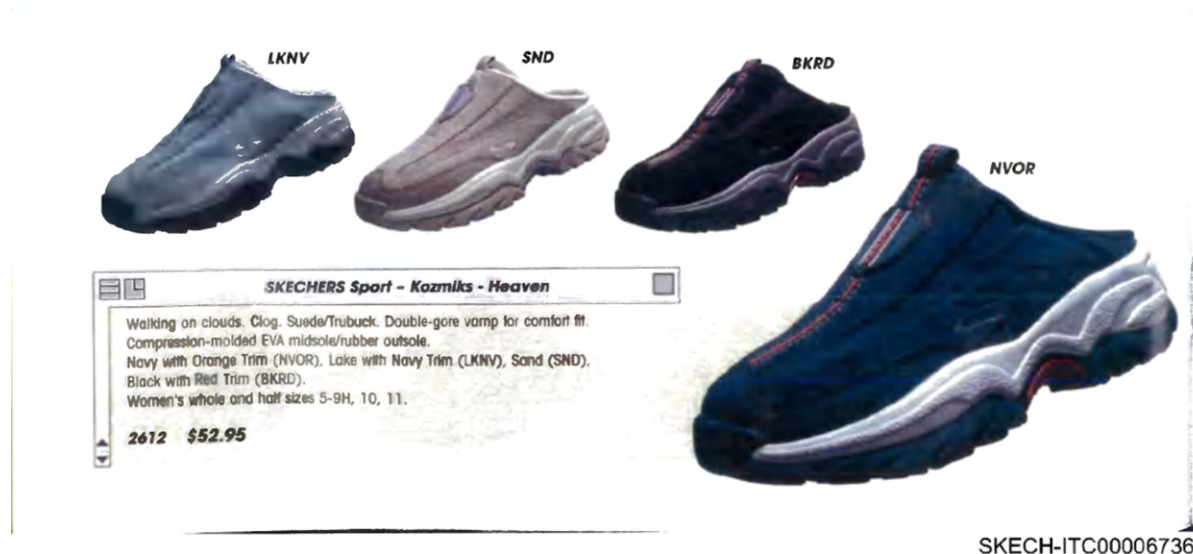
67. Mr. Besanceney admitted that the Skechers Sport Kozmiks Meteor – which was featured in a Skechers catalog from Spring 2000, before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) an open-back; (2) a swirl midsole shape and a midsole that widens as it flows from the toe cap to the heel; (3) an indented line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 145:20-149:22; 151:17-25; Compl., Dkt. 1 at ¶ 10. The Skechers Sport Kozmiks Meteor is pictured below from Welch Dec. Ex. CY (at SKNY0092706).



68. Mr. Besanceney admitted the Skechers Sport Kozmiks Meteor possessed a swirl midsole shape similar to the Traveltime shoe because that element is “typical” of athletic shoes (and of some athleisure shoes) and “any shoe” with a similar midsole and rubber bottom will “naturally have a tapered toe” and naturally have a flow up to a higher point in the arch. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 148:6-149:5. The Skechers Sport Kozmiks Meteor, Style

No. 2578 was first shipped on December 7, 1999, and Skechers sold a total of 52,136 pairs. Sadis Dec. at ¶ 9; Welch Dec. Ex. AC.

69. Mr. Besanceney admitted that the Skechers Sport Kozmiks Heaven – which was featured in a Skechers catalog from Spring 2000, four years before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) a design element on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 149:23-151:25; Compl., Dkt. 1 at ¶ 10. The Skechers Sport Kozmiks Heaven is pictured below from Welch Dec. Ex. CY (at SKNY0092707).



SKNY0092707

70. Mr. Besanceney admitted that the swirled midsole featured on the Skechers Sport Kozmiks Heaven is “typical” of athletic shoes and many athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 150:11-16.

71. Mr. Besanceney admitted that the Skechers Sport Kozmiks Heaven and the Traveltime both possess a stripe or “yoke” down the top of the upper. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 151:11-16.

72. The Skechers Sport Kozmiks Heaven, Style No. 2612 was first shipped on February 24, 2000, and Skechers sold a total of 38,713 pairs. Sadis Dec. at ¶ 10; Welch Dec. Ex. AC.

73. Mr. Besanceney admitted that the Skechers Sport Achilles Full Rhodes – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the heel; (4) a contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) a design element on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 152:9-17; 153:8-154:21; Compl., Dkt. 1 at ¶ 10. Skechers Achilles Full Rhodes, Style No. 5129, is pictured below from Exhibit AD to the Welch Dec. (at SKNY0094900).



74. The Skechers Sport Achilles Full Rhodes, Style No. 5129, was first shipped on January 7, 2002, and Skechers sold a total of 1,506 pairs. Sadis Dec. at ¶ 16; Welch Dec. Ex. AC.

75. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Sport Achilles Full Rhodes is “typical” of athletic shoes and athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 153:19-24.

76. Mr. Besanceney admitted that the Skechers Sport Achilles Rhodes – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the heel; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) a design element on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 154:22-156:10; Compl., Dkt. 1 at ¶ 10. Skechers Sport Achilles Rhodes, Style No. 5056, is pictured below from Exhibit AD to the Welch Dec. (at SKNY0094902).



77. The Skechers Sport Achilles Rhodes, Style No. 5056, was first shipped on November 27, 2000, and Skechers sold a total of 25,953 pairs. Sadis Dec. at ¶ 17; Welch Dec. Ex. AC.

78. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Sport Achilles Rhodes is “typical” of athletic shoes and many athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 155:11-16.

79. Mr. Besanceney admitted that the Skechers Sport Achilles Rhodes and the Traveltime both possess a stripe or yoke down the top of the upper. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 151:11-16; 156:11-13.

80. Mr. Besanceney admitted that the Skechers Sport Energy 2 Vibes – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) 156:14-157:19; Compl., Dkt. 1 at ¶ 10. Skechers Sport

Energy 2 Vibes, Style No. 1933, is pictured below from Exhibit AD to the Welch Dec. at SKNY0094915.



81. The Skechers Sport Energy 2 Vibes, Style No. 1933, was first shipped on October 17, 2001, and Skechers sold a total of 190,260 pairs. Sadis Dec. at ¶ 18; Welch Dec. Ex. AC.

82. Mr. Besanceney admitted that the Skechers Sport Energy 2 Dynasty – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 157:20-159:14; Compl., Dkt. 1 at ¶ 10. Skechers Sport Energy 2 Dynasty, Style No. 1833, is pictured below from Exhibit AD to the Welch Dec. at SKNY0094916.



83. Skechers Sport Energy 2 Dynasty, Style No. 1833, was first shipped on November 20, 2001, and Skechers sold a total of 188,744 pairs. Sadis Dec. at ¶ 19; Welch Dec. Ex. AC.

84. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Sport Energy 2 Dynasty is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 158:7-12.

85. Mr. Besanceney admitted that the Skechers Sport Energy 2 Electric – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 159:15-25; 160:7-23; Compl., Dkt. 1 at ¶ 10. Skechers Sport Energy 2 Electric, Style No. 1832, is pictured below from Exhibit AD to the Welch Dec. at SKNY0094916.



86. The Skechers Sport Energy 2 Electric, Style No. 1832, was first shipped on March 1, 2002, and Skechers sold a total of 206,458 pairs. Sadis Dec. at ¶ 20; Welch Dec. Ex. AC.

87. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Sport Energy 2 Electric is “typical” of athletic shoes and frequently appears on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 160:1-6.

88. Mr. Besanceney admitted that the Skechers Sport Energy 2 Electric and the Traveltime both possess a stripe or yoke down the top of the upper and that yoke ends in a T or Y shape at the toe of the shoe. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 151:11-16; 160:24-161:4.

89. Mr. Besanceney admitted that the Skechers Sport Energy 2 Crossway – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) : a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 161:7-162:12; Compl., Dkt. 1 at ¶ 10.

Skechers Sport Energy 2 Crossway, Style No. 1839, is pictured below from Exhibit AD to the Welch Dec. at SKNY0094918.



90. The Skechers Sport Energy 2 Crossway, Style No. 1839, was first shipped on March 4, 2002, and Skechers sold a total of 35,357 pairs. Sadis Dec. at ¶ 21; Welch Dec. Ex. AC.

91. Mr. Besanceney admitted that the Skechers Sport Energy 2 M Bracer – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a distinctive “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 162:13-163:18; Compl., Dkt. 1 at ¶ 10. shows Skechers Sport Energy 2 M-Bracer, Style No. 1934, is pictured below from Exhibit AD to the Welch Dec. at SKNY0094919.



92. The Skechers Sport Energy 2 M Bracer, Style No. 1934, was first shipped on October 25, 2001, and Skechers sold a total of 67,360 pairs. Sadis Dec. at ¶ 22; Welch Dec. Ex. AC.

93. Mr. Besanceney admitted that the Skechers Sport Energy Orbit, later called the Skechers Energy Orbit – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released, and in a Skechers catalog from 2004, the same year the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 163:25-165:12; 190:23-192:8; Compl., Dkt. 1 at ¶ 10. Skechers Sport Energy Orbit, Style No. 2674, is pictured below from Exhibit AD to the Welch Dec. at SKNY0094924.



94. The Skechers Sport Energy Orbit, Style No. 2674, was first shipped on March 23, 2001 and Skechers sold a total of 855,465 pairs. Sadis Dec. at ¶ 23; Welch Dec. Ex. AC.

95. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Sport Energy Orbit is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 164:12-17; 191:9-14.

96. Mr. Besanceney admitted that the Skechers Energy Orbit and the Traveltime both possess a “yoke” on the upper. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 151:11-16; 192:9-11.

97. Mr. Besanceney admitted that the Skechers Sport Energy Backslider – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) : a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 165:13-17; 166:3-11; 166:18-167:13; Compl., Dkt. 1 at ¶ 10. Skechers Sport Energy Backslider, Style No. 2660, is pictured below from Exhibit AD to the Welch Dec. at SKNY0094924.



98. Skechers Sport Energy Backslider, Style No. 2660, was first shipped on November 14, 2000, and Skechers sold a total of 862,387 pairs. Sadis Dec. at ¶ 24; Welch Dec. Ex. AC.

99. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Sport Energy Backslider is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 166:12-17.

100. Mr. Besanceney admitted that the Skechers Sport Tattle Tales Myth – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the heel; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 167:14-169:3; Compl., Dkt. 1 at ¶ 10. Skechers Sport Tattle Tales Myth, Style No. 1916 is pictured below from Exhibit AD to the Welch Dec. at SKNY0094930.



101. Skechers Sport Tattle Tales Myth, Style No. 1916, were first shipped on August 27, 2001, and Skechers sold a total of 20,722 pairs. Sadis Dec. at ¶ 25; Welch Dec. Ex. AC.

102. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Sport Tattle Tales Myth is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 168:1-6.

103. Mr. Besanceney admitted that the Skechers Sport Tattle Tales Myth and the Traveltime both possess a yoke at the top of the upper. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 169:7-10.

104. Mr. Besanceney admitted that the Skechers Sport Tattle Tales – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 169:11-170:19; Compl., Dkt. 1 at ¶ 10. Skechers Sport Tattle Tales, Style No. 2463 is pictured below from Exhibit AD to the Welch Dec. at SKNY0094930.



105. Skechers Sport Tattle Tales, Style No. 2463, was first shipped on August 15, 2001, and Skechers sold a total of 11,327 pairs. Sadis Dec. at ¶ 26; Welch Dec. Ex. AC.

106. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Sport Tattle Tales is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 169:20-25.

107. Mr. Besanceney admitted that the Skechers Sport Tattle Tales and the Traveltime both possess a yoke on the upper of the shoe. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 151:11-16; 170:21-23.

108. Mr. Besanceney admitted that both the Skechers Sport Tattle Tales Myth and Skechers Sport Tattle Tales have a U-shaped gore on the upper where the foot enters the shoe to help the shoe stretch as it is opened. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 170:24-171:10.

109. Mr. Besanceney admitted that the Skechers Sport Noogies Heckler – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper.; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the midsole at the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 171:11-172:18; Compl., Dkt. 1 at ¶ 10. Skechers Sport Noogies Heckler, Style No. 2457 is pictured below from Exhibit AD to the Welch Dec. at SKNY0094934.



110. Skechers Sport Noogies Heckler, Style No. 2457, was first shipped on December 28, 2000, and Skechers sold a total of 202,687 pairs. Sadis Dec. at ¶ 27; Welch Dec. Ex. AC.

111. The Skechers Sport Noogies Heckler has a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel. Welch Dec. Ex. AD at SKNY0094934.

112. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Sport Noogies Heckler is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 171:22-172:2.

113. Mr. Besanceney admitted that the Skechers Sport Noogies Heckler and the Traveltime both possess a yoke on the upper of the shoe. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 151:11-16; 172:19-173:12.

114. Mr. Besanceney admitted that the Skechers Sport Noogies Bedevil – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a distinctive “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the

heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 173:13-174:-25; Compl., Dkt. 1 at ¶ 10. Skechers Sport Noogies Bedevil, Style No. 1936, is pictured below from Exhibit AD to the Welch Dec. at SKNY0094934.



115. The Skechers Sport Noogies Bedevil, Style No. 1936, were first shipped on October 22, 2001, and Skechers sold a total of 73,410 pairs. Sadis Dec. at ¶ 28; Welch Dec. Ex. AC.

116. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Sport Noogies Bedevil is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 174:2-8.

117. Mr. Besanceney admitted that the Skechers Sport Noogies Bedevil and the Traveltime both possess a yoke on the upper of the shoe. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 151:11-16; 175:1-3.

118. Mr. Besanceney admitted that the Skechers Sport Noogies Mimic – which was featured in a Skechers catalog from Fall 2002, two years before the Traveltime was released – has the claimed Traveltime trade dress elements, including: (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the

outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 175:4-7; 175:22-176:19; Compl., Dkt. 1 at ¶ 10. Skechers Sport Noogies Mimic, Style No. 1830, is pictured below from Exhibit AD to the Welch Dec. at SKNY0094934.



119. The Skechers Sport Noogies Mimic is an open-back shoe. Welch Dec. Ex. AD at SKNY0094934.

120. Mr. Besanceney admitted that the Skechers Sport Noogies Mimic and the Traveltime both possess a yoke on the upper of the shoe. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 151:11-16; 176:20-21.

121. Mr. Besanceney admitted that the Skechers Premium Flick – which was featured in a Skechers catalog from 2004, the same year the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) : a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec.

Ex. J (Besanceney Depo. Tr.) at 178:11-24; 179:6-24; Compl., Dkt. 1 at ¶ 10. Skechers Premium Flick, Style No. 11052 is pictured below from Exhibit AE to the Welch Dec. at SKNY0095919.



122. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Premium Flick is “typical” of athletic shoes and often present on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 178:25-179:5.

123. The Skechers Premium Flick, Style No. 11052, was first shipped on April 9, 2004, and Skechers sold a total of 24,959 pairs. Sadis Dec. at ¶ 30; Welch Dec. Ex. AC.

124. Mr. Besanceney admitted that the Skechers Premium Flick and the Traveltime both possess a yoke on the upper of the shoe. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 151:11-16; 179:25-180:1.

125. Mr. Besanceney admitted that the Skechers Premium Getgos – which was featured in a Skechers catalog from 2004, the same year the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe

to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 180:2-181:11; Compl., Dkt. 1 at ¶ 10. Skechers Premium GetGos, Style No. 11043 is pictured below from Exhibit AE to the Welch Dec. at SKNY0095920.



126. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Premium Getgos is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 180:13-18.

127. The Skechers Premium Getgos, Style No. 11043, was first shipped on March 2, 2004, and Skechers sold a total of 14,378 pairs. Sadis Dec. at ¶ 31; Welch Dec. Ex. AC.

128. Mr. Besanceney admitted that the Skechers Premium Peppermint – which was featured in a Skechers catalog from 2004, the same year the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 181:12-182:21; Compl., Dkt. 1 at ¶ 10. Skechers Premium

Peppermint, Style No. 11061 is pictured below from Exhibit AE to the Welch Dec. at SKNY0095920.



129. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Premium Peppermint is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 182:6-13.

130. The Skechers Premium Peppermint, Style No. 11061, was first shipped on May 18, 2004, and Skechers sold a total of 5,897 pairs. Sadis Dec. at ¶ 32; Welch Dec. Ex. AC.

131. Mr. Besanceney admitted that the Skechers Premium Reward – which was featured in a Skechers catalog from 2004, the same year the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 182:22-184:3; Compl., Dkt. 1 at ¶ 10. Skechers Premium Reward, Style No. 1712 is pictured below from Exhibit AE to the Welch Dec. at SKNY0095920.



132. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Premium Reward is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 183:5-10.

133. The Skechers Premium Reward, Style No. 1712, was first shipped on July 30, 2003, and Skechers sold 421,809 pairs. Sadis Dec. at ¶ 33; Welch Dec. Ex. AC.

134. Mr. Besanceney admitted that the Skechers Premium Spotlight – which was featured in a Skechers catalog from 2004, the same year the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 184:4-185:14; Compl., Dkt. 1 at ¶ 10. Skechers Premium Spotlight, Style No. 11079 is pictured below from Exhibit AE to the Welch Dec. at SKNY0095921.



135. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Premium Spotlight is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 184:15-20.

136. The Skechers Premium Spotlight, Style No. 11079, was first shipped on May 18, 2004, and Skechers sold a total of 23,559 pairs. Sadis Dec. at ¶ 34; Welch Dec. Ex. AC.

137. Mr. Besanceney admitted that the Skechers Premium Delicious – which was featured in a Skechers catalog from 2004, the same year the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 185:15-186:22; Compl., Dkt. 1 at ¶ 10. Skechers Premium Delicious, Style No. 11009 is pictured below from Exhibit AE to the Welch Dec. at SKNY0095921.



138. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Premium Delicious is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 185:23-186:3.

139. The Skechers Premium Delicious, Style No. 11009, was first shipped on March 2, 2004, and Skechers sold a total of 40,817 pairs. Sadis Dec. at ¶ 35; Welch Dec. Ex. AC.

140. Mr. Besanceney admitted that the Skechers Premium Bright Eyes – which was featured in a Skechers catalog from 2004, the same year the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 186:22-187:23; Compl., Dkt. 1 at ¶ 10. Skechers Premium Bright Eyes, Style No. 11021 is pictured below from Exhibit AE to the Welch Dec at SKNY0095921.



141. The Skechers Premium Bright Eyes, Style No. 11021, was first shipped on December 16, 2003, and Skechers sold a total of 1,167,960 pairs. Sadis Dec. at ¶ 36; Welch Dec. Ex. AC.

142. Mr. Besanceney admitted that the Skechers Premium Hookups – which was featured in a Skechers catalog from 2004, the same year the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) : a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 187:24-188:25; Compl., Dkt. 1 at ¶ 10. Skechers Premium Hookups, Style No. 11062 is pictured below from Exhibit AE to the Welch Dec. at SKNY0095921.



143. The Skechers Premium Hookups, Style No. 11062, was first shipped on May 7, 2004, and Skechers sold a total of 5,007 pairs. Sadis Dec. at ¶ 37; Welch Dec. Ex. AC.

144. Mr. Besanceney admitted that the Skechers Premium Sizzling – which was featured in a Skechers catalog from 2004, the same year the Traveltime was released – has all of the claimed Traveltime trade dress elements, including: (1) a slip-on, clog-style upper; (2) a “swirl” midsole that runs from the base of the toe cap and widens as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel and another indented line on the rear of the shoe; (4) a combined contoured midsole and outsole with an arch that creates an open area between the outsole and heel; (5) a rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) design elements on the heel segment. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 189:1-190:10; Compl., Dkt. 1 at ¶ 10. Skechers Premium Sizzling, Style No. 11070 is pictured below from Exhibit AE to the Welch Dec. at SKNY0095922.



145. Mr. Besanceney admitted that the swirl midsole featured on the Skechers Premium Sizzling is “typical” of athletic shoes and common on athleisure shoes. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 189:12-17.

146. The Skechers Premium Sizzling, Style No. 11070, was first shipped on June 7, 2004, and Skechers sold a total of 120,762 pairs. Sadis Dec. at ¶ 38; Welch Dec. Ex. AC.

147. Skechers continued to sell casual, open-back shoes bearing many of the claimed trade dress elements into the 2010s, with such offerings as the Skechers D’Lites Nuzzles, Skechers Premium Sumptuous, Skechers D’Lites Levitate, D’Lite Airy, Skechers Sport Energy Lovin’, Skechers Bravos Shakers, Skechers Flex Fit First Place, Skechers Flex Fit Slam Dunk, Skechers Agility Kickback, and Skechers D’Lites Star Status. Sadis Dec. at ¶¶ 39-48.

148. The Skechers D’Lites Nuzzles bears all elements of the claimed trade dress, and is depicted below. Welch Dec. Ex. AF at SKNY0096638 (showing the Skechers D’Lites Nuzzles, Style No. 11467 from the Skechers 2008).



149. The Skechers D'Lites Nuzzles, Style No. 11467, was first shipped on June 30, 2008, and Skechers sold 97,930 pairs. Sadis Dec. at ¶ 39; Welch Dec. Ex. AC.

150. The Skechers Premium Sumptuous bears all elements of the claimed trade dress, and is depicted below. Welch Dec. Ex. AF at SKNY0096639 (showing the Skechers Premium Sumptuous, style number 11302, offered for sale in the Skechers 2008 catalog).



151. The Skechers Premium Sumptuous, Style No. 11302, was first shipped on September 12, 2006, and Skechers sold a total of 206,826 pairs. Sadis Dec. at ¶ 40; Welch Dec. Ex. AC.

152. The Skechers D'Lites Levitate, Style No. 11448, bears all elements of the claimed trade dress, and is shown below. Welch Dec. Ex. AG at SKNY0096692 (showing the Skechers D'Lites Levitate, style number 11448, offered for sale in the Skechers Spring 2008 catalog).



153. The Skechers D'Lites Levitate, Style No. 11448, was first shipped on March 24, 2008, and Skechers sold a total of 12,999 pairs. Sadis Dec. at ¶ 41; Welch Dec. Ex. AC.

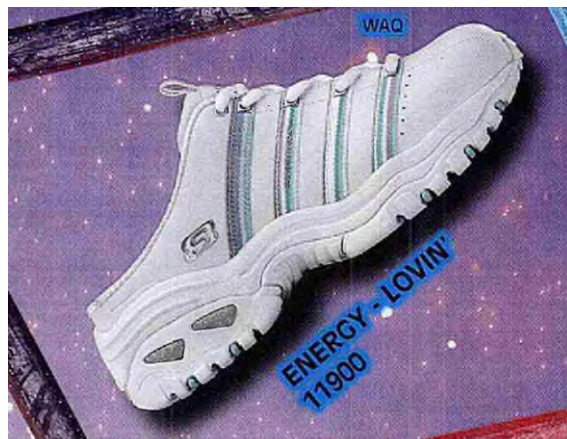
154. Skechers D'Lites Airy, Style No. 11449, bears all elements of the claimed trade dress, and is shown below. Welch Dec. Ex. AG at SKNY0096692 (showing the Skechers D'Lites Airy, Style No. 11449, offered for sale in the Skechers Spring 2008 catalog).



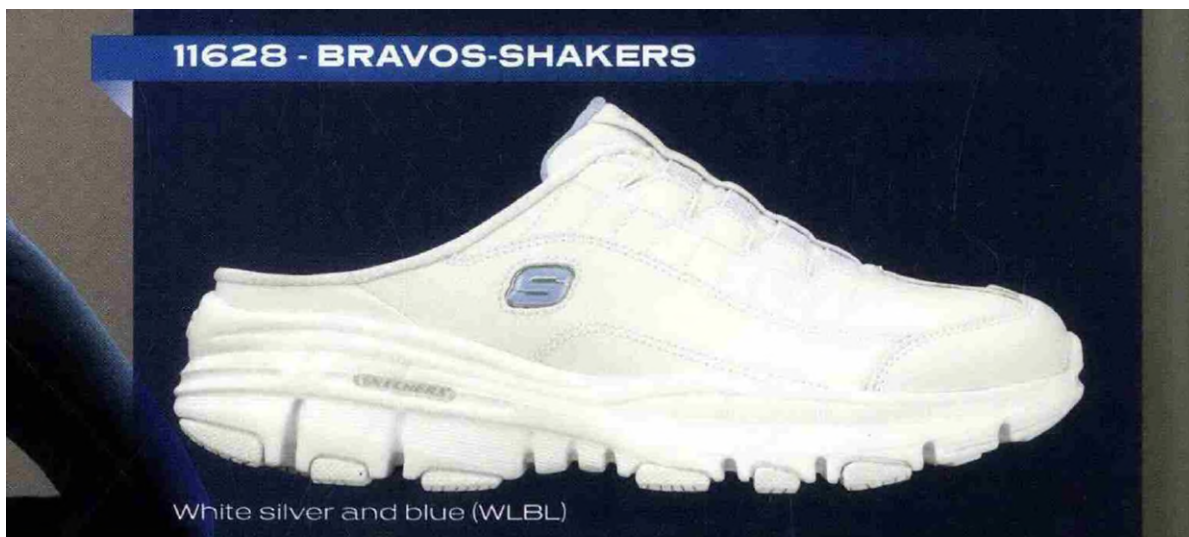
155. The Skechers D'Lites Airy, Style No. 11449, was first shipped on March 24, 2008, and Skechers sold a total of 162,657 pairs. Sadis Dec. at ¶ 42; Welch Dec. Ex. AC.

156. The Skechers Sport Energy Lovin', style No. 11900, bears all elements of the claimed trade dress, and is shown below. Welch Dec. Ex. AH at SKNY0096730 (showing the

Skechers Sport Energy Lovin', style number 11900, offered for sale in the Skechers Women's Sport Fall 2009 catalog).



157. The Skechers Bravos Shakers, Style No. 11628, bears all elements of the claimed trade dress, and is shown below. Welch Dec. Ex. AI at SKNY0097117 (showing the Skechers Bravos Shakers, style number 11628, offered for sale in the Skechers Sport 2011-2012 catalog).



158. Skechers Bravos Shakers, Style No. 11628, was first shipped on December 2, 2011, and Skechers sold a total of 22,498 pairs. Sadis Dec. at ¶ 44; Welch Dec. Ex. AC.

159. The Skechers Flex Fit First Place, Style No. 11663, bears the first, second, third, and fifth elements of the claimed trade dress, and is depicted below. Welch Dec. Ex. AI at SKNY0097121.



160. The Skechers Flex Fit First Place, Style No. 11663, was first shipped on April 26, 2012, and Skechers sold 13,594 pairs. Sadis Dec. at ¶ 45; Welch Dec. Ex. AC.

161. The Skechers Flex Fit Slam Dunk, Style No. 11664, bears the first, second, third, and fifth elements of the claimed trade dress, and is depicted below. Welch Dec. Ex. AI at SKNY0097121.



162. The Skechers Flex Fit Slam Dunk, Style No. 11664, was first shipped on May 4, 2012, and Skechers sold 39,891 pairs. Sadis Dec. at ¶ 46; Welch Dec. Ex. AC.

163. Skechers Agility Kick Back, Style No. 11697, bears the first, second, third, fourth, and fifth elements of the claimed trade dress, and is depicted below. Welch Dec. Ex. ## at SKNY0000767.



164. The Skechers D'Lites Star Status, Style No. 11586, bears all elements of the claimed trade dress, and is depicted below. Welch Dec. Ex. CZ at SKNY0000767.



165. The Skechers D'Lites Star Status, Style No. 11586, was first offered for sale on December 11, 2009, and Skechers sold 13,970 pairs. Sadis Dec. at ¶ 48; Welch Dec. Ex. AC.

H. Third-Party Shoes Featuring Easy Spirit's Claimed Trade Dress Elements

166. The below paragraphs refer to the various claimed trade dress elements by the following numbers: (1) a slip-on, clog-style upper; (2) a distinctive “swirl” mid-sole that runs from the base of the toe cap, gradually widening as it flows to the heel; (3) an indented curved line along the midsole from the front to the heel; another indented line on the rear of the shoe; (4) a combined contoured midsole/outsole with an arch that creates an open area between the outsole and heel; (5) the rubber outsole extending up from the bottom of the shoe to the front of the shoe to form a bumper; and (6) four circular design elements on the midsole at the heel segment. With respect to the four circular design elements on the midsole at the heel segment, any design element on the heel segment is considered to capture the claimed trade dress, per the allegations in the Complaint. Compl., Dkt. 1 at ¶ 21.

167. The third-party shoe Caleres Ryka Lillianna Mule possesses all six elements of the Traveltime trade dress. Welch Dec. Ex. AJ (shown below). The elements can be seen below:



168. The third-party shoe Dansko Kenzie Clog possesses all six elements of the Traveltime trade dress, shown below. Welch Dec. Ex. AL (shown below).



Dansko Brown Leather Kenzie Clog

Dansko

\$40 \$0

SIZE

8

169. From 2010 to 2019, Dansko sold [REDACTED] of the Dansko Kenzie Clog. Welch Dec. Ex. AM Declaration Certifying Authenticity of Records from Dansko (“Dansko Dec.”) at 1; Welch Dec. Ex. A at DANSK_000001.

170. The third-party shoe Dansko Kaya Clog possesses all six elements of the Traveltime trade dress. Welch Dec. Ex. AN (shown below).



pickynikki23

Updated 3 mins ago

Dansko Women's Kaya Clog Black Women's Size 37

Dansko

\$65 \$130

SIZE

37 (EU)

171. From 2010 to 2019, Dansko sold [REDACTED] of the Dansko Kenzie Clog. Welch Dec. Ex. AM at Dansko Dec. at 1; Welch Dec. Ex. AM at DANSK_000001.

172. The third-party shoe New Balance 801 possesses all six elements of the Traveltime trade dress. Welch Dec. Ex. AO at SKNY0098956. Easy Spirit Rule 30(b)(6)

designee Mr. Besanceney admits that the New Balance 801 shoe has an open-back clog style upper, a swirl midsole, recessed lines on the midsole, a recessed line at the heel, a combined contoured midsole and outsole with an arch creating a break between the heel and the outsole, an outsole extending up from the bottom of the shoe to the front to form a bumper, and a design element on the heel. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 231:19-235:6; Welch Dec. Ex. AO. The third-party shoe New Balance 801 possesses all six elements of the Traveltime trade dress, as shown below.



173. Mr. Besanceney was aware of the New Balance 801 shoe during his time working as the designer of the Traveltime shoe and other Easy Spirit designers were also aware of the New Balance 801 shoe. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 233:21-235:6.

174. Easy Spirit considers the third-party company New Balance's "801" shoe to be a competitor to the Traveltime. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 234:11-13; Welch Dec. Ex. AO.

175. From 2006 to 2016, New Balance sold [REDACTED] of the New Balance 801. Welch Dec. Ex. AP Declaration Certifying Authenticity of Records from New Balance (“New Balance Dec.”) at 1; Welch Dec. Ex. AP at NEWB_000001-02.

176. Easy Spirit considers the third-party company New Balance’s “802” shoe to be a competitor to the Traveltime. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 237:2-14; Welch Dec. Ex. AQ.

177. Easy Spirit’s Rule 30(b)(6) designee Mr. Besanceney admits that the New Balance 802 shoe is an open-back clog-style shoe with a swirl midsole, indented or recessed line on the midsole, indented or recessed line on the heel, a combined or contoured midsole and outsole with an arch that creates a break between the outsole and the heel, a rubber outsole extending up from the bottom of the shoe to the front to form a bumper, and a design element on the heel midsole. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 235:14-237:24; Welch Dec. Ex. AQ. The third-party shoe New Balance 802 possesses all six elements of the Traveltime trade dress. Welch Dec. Ex. AQ at SKNY0099020. All claimed elements can be seen below.



178. Easy Spirit was aware of the New Balance 802 shoe because of competitive shopping. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 237:6-14.

179. From 2006 to 2016, New Balance sold [REDACTED] of the New Balance 802. Welch Dec. Ex. AP at New Balance Dec. at 1; Welch Dec. Ex. AP at NEWB_000001-02.

180. The third-party shoe New Balance Everlight Womens Slip On Mule possesses five of the six elements (1, 2, 3, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. AR at SKNY0099037. Easy Spirit's Rule 30(b)(6) designee Mr. Besanceney admits that the New Balance Everlight shoe is an open-back clog-style mule or clog-style shoe with a swirl midsole, a combined or contoured midsole and outsole with an arch that creates a break between the heel and outsole, and a rubber outsole extending up from the bottom of the shoe to the front to form a bumper. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 238:1-239:12; Welch Dec. Ex. AR. The claimed elements can be seen here.



181. The third-party shoe New Balance FuelCore NERGIZE Mule possesses four of the six elements (1, 2, 3, and 5) of the Traveltime trade dress. Welch Dec. Ex. AS. Easy Spirit

considers the third-party company New Balance’s “FuelCore Nergize Mule” shoe to be a competitor to the Traveltime. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 239:24-241:14; Welch Dec. Ex. AT. Easy Spirit’s Rule 30(b)(6) designee Mr. Besanceney admits that the New Balance FuelCore Nergize Mule shoe is an open-back clog-style shoe with a rubber bumper extending from under the outsole of the shoe up to the front. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 241:15-24; Welch Dec. Ex. AT; Mr. Besanceney was aware of the New Balance FuelCore Nergize Mule shoe. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 241:6-11. The claimed elements can be seen here.



182. The third-party shoe Walmart Athletic Works Essential Slip On Athletic Shoe possesses all six elements of the Traveltime trade dress. Welch Dec. Ex. AU; Welch Dec. Ex. AV. Mr. Besanceney believes this shoe, the “Athletic Works Women’s Athletic Works Essential Slip On Athletic Shoe” looks like the Traveltime shoe. Welch Dec. Ex. J (Besanceney Depo. Tr.)

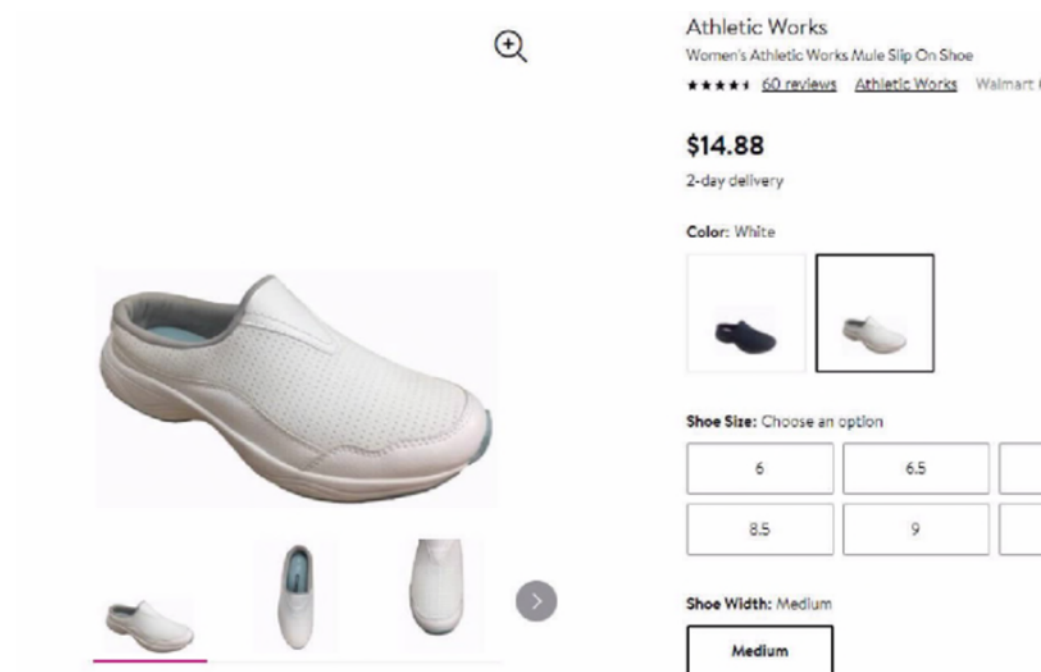
at 227:5-228:7; Welch Dec. Ex. AW; Welch Dec. Ex. AU; Welch Dec. Ex. AV. The claimed elements can be seen here.



183. The Walmart Athletic Works Essential Slip On Athletic Shoe is currently for sale on walmart.com. Welch Dec. Ex. DA.

184. Easy Spirit was aware of the Walmart Athletic Works Essential Slip On Athletic Shoe, but was unaware if of what, if any action was taken regarding that shoe. Welch Dec. Ex. K (DeZao Depo. Tr.) at 158:6-162:4.

185. The third-party shoe Walmart Athletic Works Women's Athletic Works Mule Slip On Shoe possesses five of the six elements (1, 2, 3, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. AX; Mr. Besanceney believes the only element in the third-party company Walmart's "Athletic Works Women's Athletic Works Mule Slip On Shoe" that does not resemble the Traveltime is the overlay on the upper. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 229:18-25; Welch Dec. Ex. AX. The claimed elements can be seen here.



186. The Walmart Athletic Works Women's Athletic Works Mule Slip On Shoe is currently for sale on Walmart.com. Welch Dec. Ex. AX.

187. The third-party shoe Eastland Currant Clog possesses all six elements of the Traveltime trade dress. Welch Dec. Ex. AY at EASTL_000001. The claimed elements can be seen below.



188. Eastland has sold [REDACTED] of the Eastland Currant Clog. Welch Dec. Ex. AY (Declaration Certifying Authenticity of Records from Eastland (“Eastland Dec.”)) at 1; Welch Dec. Ex. AY at EASTL_000115.

189. The third-party shoe Eastland Shoe Cynthia Women’s Clog possesses all six elements of the Traveltime trade dress. Welch Dec. Ex. AZ. The claimed elements can be seen below.

Eastland Cynthia Women's Clogs



190. Eastland has sold [REDACTED] of the Eastland Shoe Cynthia Women's Clog. Welch Dec. Ex. AY (Eastland Dec.) at 1; Welch Dec. Ex. AY at EASTL_000162.

191. The third-party shoe Caleres Ryka Catalyst Mule possesses five of the six elements (1, 2, 3, 5, and 6) of the Traveltime trade dress. Welch Dec. Ex. BA. The claimed elements can be seen below.



192. The third-party shoe Airwalk Etura Esque, which was for sale from at least 2003, possesses four of the six elements (1, 2, 3, and 5) of the Traveltime trade dress. Sadis Dec. at ¶ 59; Welch Dec. Ex. BB at SKNY0080842. The claimed elements can be seen below.



193. The third-party shoe Airwalk Clogger (style 23079), which was for sale from at least 1997, possesses four of the six elements (1, 2, 3, and 5) of the Traveltime trade dress. Sadis Dec. at ¶ 60; Welch Dec. Ex. BC at SKNY0080850. The claimed elements can be seen below.

C L O G G E R



194. The third-party shoe Betula Clout (style 35143446) possesses four of the six elements (1, 2, 4, and 5) of the Traveltime trade dress. Sadis Dec. at ¶ 63; Welch Dec. Ex. DB. The claimed elements can be seen below.



195. The third-party shoe Easy Street Holly Women's Mule possesses five of the six elements (1, 2, 3, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. BD. The claimed elements can be seen below.

Easy Street Holly Women's Mules



196. From 2012 to 2019, Easy Street/Charm Step sold [REDACTED] of the Holly Women's Mule. Welch Dec. Ex. BE (Declaration Certifying Authenticity of Records from Easy Street/Charm Step ("Charm Dec.")) at 1; Welch Dec. Ex. BE at CHARM_000008.

197. The third-party shoe Easy Street Roam Women's Sport Mule possesses five of the six elements (1, 2, 3, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. BF. The claimed elements can be seen below.

Easy Street Roam Women's Sport Mule



198. Since 2019, Easy Street has sold [REDACTED] of the Easy Street Roam Women's Sport Mule. Welch Dec. Ex. BE (Charm Step Dec.) at 1; Welch Dec. Ex. BE at CHARM_000008.

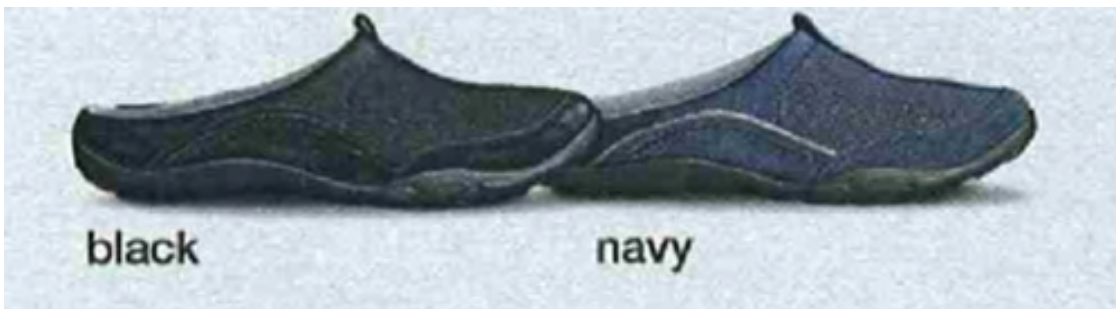
199. The third-party shoe Easy Street Sport Barbara Women's Print Clog possesses five of the six elements (1, 2, 3, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. BG. The claimed elements can be seen below.

Easy Street Sport Barbara Women's Print Clogs



200. From 2015 to 2019, Easy Street has sold [REDACTED] of the Easy Street Sport Barbara Women's Print Clog. Welch Dec. Ex. BE (Charm Step Dec.) at 1; Welch Dec. Ex. BE at CHARM_000008.

201. The third-party shoe Clarks Clog (styles 540 771 16Y; 540 771 25Y), which was for sale from at least 2013, possesses five of the six elements (1, 2, 3, 4, and 5) of the Traveltime trade dress. Sadis Dec. at ¶ 58; Welch Dec. Ex. BH at SKNY0080806. The claimed elements can be seen below.



202. The third-party shoe Cole Haan Nike Air Mule possesses five of the six elements (1, 2, 4, 5, and 6) of the Traveltime trade dress. Welch Dec. Ex. BI. The claimed elements can be seen below.



Cole Haan Suede Nike Air Mules
Women's Size 7

Cole Haan

\$30 ~~\$0~~

SIZE

7

203. The third-party shoe Ecco Receptor possesses four of the six elements (1, 2, 3, and 5) of the Traveltime trade dress. Welch Dec. Ex. BJ at SKNY0080764. The claimed elements can be seen below.



Art.: 26454
Corinthian Leather

Size: 39-47
09001 Black
50198 Navajo Brown/Black

204. The Ecco Receptor was offered for sale at least in 2004 as part of the Ecco Spring/Summer 2004 – Receptor™ Collection. Sadis Dec. at ¶ 52; Welch Dec. Ex. BJ at SKNY0080764.

205. The third-party shoe Ecco Receptor Light Clog possesses five of the six elements (1, 2, 3, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. BK at SKNY0080863. The claimed elements can be seen below.

Receptor Light Clog



206. The Ecco Receptor Light Clog was offered for sale at least in 2001 as part of the Ecco AW 2001 Collection. Sadis Dec. at ¶ 53; Welch Dec. Ex. BK at SKNY0080764.

207. The third-party shoe Ecco Arizona Clog possesses five of the six elements (1, 2, 3, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. BL at SKNY0080827. The remaining elements can be seen below.

Cross Terrain

Arizona Clog

Article 25434	Size 41-47
Color 101 Black	Material Leather/ Textile
201 Black 804 Stone/Navy 810 Mole/Black 50055 True Navy/ Silver*	Nubuck/Textile
40103	

208. The Ecco Arizona Clog was offered for sale at least in 2003 as part of the Ecco Spring & Summer 2003 catalog. Sadis Dec. at ¶ 54; Welch Dec. Ex. BL at SKNY0080827.

209. The third-party shoe Ecco Soft Sneaker possesses five of the six elements (1, 2, 3, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. BM at SKNY0080830. The claimed elements can be seen below.

Soft Sneaker



210. The Ecco Soft Sneaker was offered for sale at least in 2001 as part of the Ecco S/S 2001 Collection. Sadis Dec. at ¶ 52; Welch Dec. Ex. BM at SKNY0080830.

211. The third-party shoe Ecco Clog possesses five of the six elements (1, 2, 3, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. BN at SKNY0080794. The claimed elements can be seen below.



CLOG

Art.: 25524
Color: 101 Black
328 Mole/Stone
985 Ascot/Black
Size: 40-47

212. The Ecco Clog was offered for sale at least in 2001 as part of the Ecco A/W 2001 catalog. Sadis Dec. at ¶ 56; Welch Dec. Ex. BN at SKNY0080794.

213. The third-party shoe Merrell Encore Breeze 3 possesses four of the six elements (1, 2, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. BO at ESNY_000636. The claimed elements can be seen below.



[\[https://www.amazon.com/dp/B00E8FRE2K?tag=atopdailyaatable-20\]](https://www.amazon.com/dp/B00E8FRE2K?tag=atopdailyaatable-20)

Merrell Women's Encore Breeze 3 Slip-On Shoe

214. The Merrell Encore Breeze 3 was offered for sale at least in 2019 as advertised in ATOPDAILY's "Top 10 Best Shoes for Standing All Day in 2019." Welch Dec. Ex. BO at ESNY_000636.

215. The third-party shoe Merrell Cargo Slide five of the six elements (1, 2, 3, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. BP at SKNY0080781. The claimed elements can be seen below.



216. The Merrell Cargo Slide was offered for sale at least in 2001 as advertised in Jim Rennie's "What's New What's Hot" publication. Sadis Dec. at ¶ 57; Welch Dec. Ex. BP at SKNY0080781.

217. The third-party shoe Propet Float-Away possesses four of the six elements (1, 2, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. BQ at SKNY0080867. Easy Spirit admits that the Propet Float-Away possesses element one: "a slip-on, clog-style upper." Welch Dec. Ex. AK at Response No. 158. The remaining elements can be seen below.



Propet

"Float-Away" Light Leather Clog

Wearing this **Ultra-Light Leather Clog** is like capturing a breath of fresh air. Your foot is surrounded in comfort with padded collar; leather lining; high-density EVA midsole; and removable, contoured, cushioned insole. Rubber sole has a rocker profile for a natural walking motion, $\frac{3}{4}$ " at the heel. Roomy toe area.

100513 White Leather
 100515 Denim Blue/Black Nubuck Leather
 100516 Dusty Taupe/Choco Nubuck Leather
 *100517 Black/Pebble Nubuck Leather

B.A. Mason Insider Price \$49.88 *soft cushioned insole (removable)*

AA (N)	7 to 11
B (M)	5 to 11
D (W)	6 to 11
EE (WW)	6 to 11

Also Half Sizes
 (Add \$2 for sizes 10 $\frac{1}{2}$ and larger)
 *100517 not available in AA width

www.bamason.com

218. The Propet Float-Away was offered for sale at least in 2004 as part of B.A. Mason 100 Year Anniversary Catalog. Sadis Dec. at ¶ 61; Welch Dec. Ex. BQ at SKNY0080867.

219. The third-party shoe Propet Women's Sports Leather Canyon Walker possesses four of the six elements (1, 2, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. BQ at SKNY0080868. The claimed elements can be seen below.



Propet

Women's Sports Leather Canyon Walker™

Propet's Canyon Walker™ sport casuals are available in **Nubuck or Full Grain Leather**, plus all are machine washable. They also have soft, brushed nylon linings and neoprene topline that stretch with you. Soft-lugged rubber outsoles. Removable, cushioned insoles.

4382 Denim Blue Nubuck Leather Slip-On
 4383 White Leather/Navy Blue Slip-On
 *101807 White Leather Slide
 *101808 Sand Leather Slide ~~\$59.88~~
B.A. Mason Insider Price \$56.88

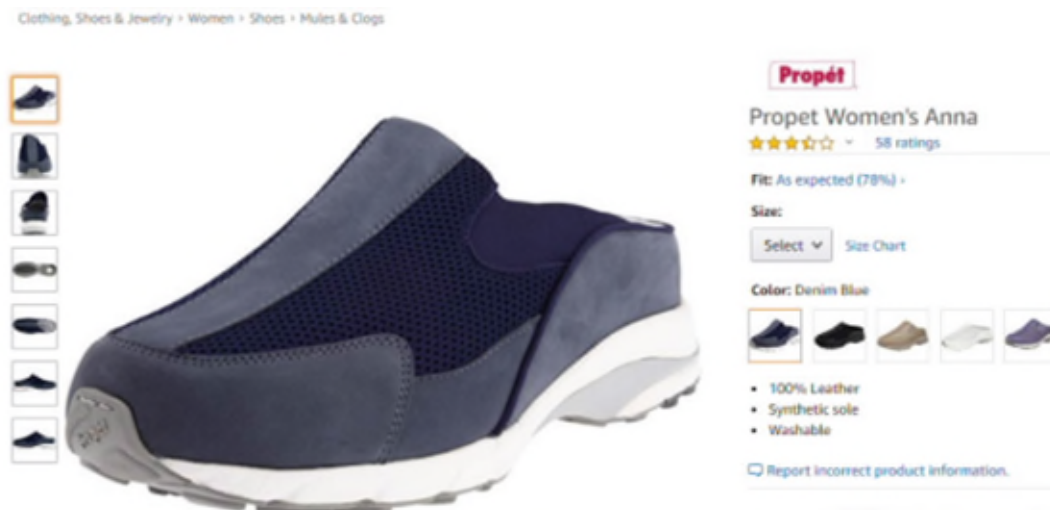
AA (N)	6 to 11
B (M)	5 to 11
D (W)	6 to 11
EE (WW)	6 to 11
EEEE (XW)	6 $\frac{1}{2}$ to 11

Also Half Sizes
 (Add \$2 for sizes 10 $\frac{1}{2}$ and larger)
 * 101807, 101808 not available in AA, EEEE widths

wide WIDTHS

220. The Propet Women's Sports Leather Canyon Walker was offered for sale at least in 2004 as part of B.A. Mason 100 Year Anniversary Catalog. Sadis Dec. at ¶ 62; Welch Dec. Ex. BQ at SKNY0080868.

221. The third-party shoe Propet Women's Anna Clog possesses five of the six elements (1, 2, 3, 4, and 5) of the Traveltime trade dress. Welch Dec. Ex. BR (Besanceney Exhibit 77). Mr. Besanceney believe the third-party company Propet's "Anna" shoe looks like the Traveltime. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 230:10-231:9; Welch Dec. Ex. BR. Mr. DeZao also stated the Propet Women's Anna Clog is "very similar" to the Traveltime shoe. Welch Dec. Ex. K (DeZao Depo. Tr.) at 169:21-171:7; Welch Dec. Ex. BR. The claimed elements can be seen below.



222. The Propet Women's Anna Clog was offered for sale at least through Amazon's website earlier in 2020. Welch Dec. Ex. BR.

223. The third-party shoe Walking Cradle Shoe possesses all elements of the Traveltime trade dress. Welch Dec. Ex. BS; Welch Dec. Ex. DC. Mr. Besanceney and Mr. DeZao, Senior VP of Product Design and Development for Easy Spirit, admit that this shoe is a "knockoff of the Traveltime" and looks "remarkably like the Traveltime." and "aesthetically [] is

virtually identical” to the Traveltime. Welch Dec. Ex. J (Besanceney Depo. Tr.) at 223:21-225:24; Welch Dec. Ex. K (DeZao Depo. Tr.) at 146:9-22; Welch Dec. Ex. BS. Mr. DeZao considers the Walking Cradle shoe, of which he was previously aware, a Traveltime copycat because it is “very, very similar to Traveltime, almost identical.” Welch Dec. Ex. K (DeZao Depo. Tr.) at 24:21-25:2, 165:17-166:6; 168:2-10. The claimed elements can be seen below.



224. Tommy Hilfiger designed shoes in 2002, shown below that feature elements (1, 2, 3, 4, of the Traveltime trade dress. Welch Dec. Ex. B (Teteriatnikov Depo. Tr.) at 228:15-25; 229:1-7; Welch Dec. Ex. R.



225. Easy Spirit has not initiated any litigations against any third party, except Skechers, for the manufacture, production, sale, or other promotion of shoes which allegedly

infringe the claimed Traveltime trade dress as defined in Easy Spirit's Complaint. Welch Dec. Ex. AK at Response No. 194; Welch Dec. Ex. K (DeZao Depo. Tr.) at 212:4-7; Welch Dec. Ex. J (Besanceney Depo. Tr.) at 228:20-23.

I. Third-Party Registration and Use of Similar Trademarks for Footwear

226. Mephisto S.A. Joint Stock Company owns a trademark registration for MEPHISTO TRAVEL'S on the Principal Register, covering footwear (Reg. No. 1,602,419). Welch Dec. Ex. BT.

227. Mephisto sells a collection of shoes for travel and walking, called the "Travel" collection. Welch Dec. Ex. BU.

228. Foot Supports International Limited owns a trademark registration for TRAVEL FEET on the Principal Register, covering insoles; insoles for footwear (Reg. No. 5,044,108). Welch Dec. Ex. BV.

229. Consolidated Shoe Company, Inc. owns a trademark registration for TRAVEL LITE OTBT on the Principal Register, covering footwear (Reg. No. 5,118,467). Welch Dec. Ex. BW.

230. Consolidated Shoe Company sells a collection of casual "athleisure" walking shoes for women, called "Travel Lite." Welch Dec. Ex. BX; Welch Dec. Ex. BY.

231. Propet Global Limited owns a registration for TRAVELACTIV on the Supplemental Register, covering footwear (Reg. No. 5,986,565). Welch Dec. Ex. BZ.

232. Propet sells a clog-like slip-on shoe for women called the "TravelActive." Welch Dec. Ex. CA; Welch Dec. Ex. CB (Declaration Certifying Authenticity of Records from Propet ("Propet Dec.")) at 1; Welch Dec. Ex. CB at PROP_000008; PROP_000009; PROP_000070; PROP_000170; PROP_000177.

233. Propet sells a fashion sneaker for women called the “TravelActive.” Welch Dec. Ex. CC; Welch Dec. Ex. CB (Propet Dec.) at 1; Welch Dec. Ex. CB at PROP_000008; PROP_000009; PROP_000068; PROP_000069.

234. Propet sells a fashion sneaker for women called the “TravelWalker.” Welch Dec. Ex. CB (Propet Dec.) at 1; P Welch Dec. Ex. CB at PROP_000007; PROP_000071; PROP_000103; PROP_000171.

235. Propet sells a fashion sneaker for women called the “TravelFit.” Welch Dec. Ex. CB (Propet Dec.) at 1; Welch Dec. Ex. CB at PROP_000004; PROP_000008; PROP_000009; PROP_000036; PROP_000065; PROP_000066; PROP_000067; PROP_000170; PROP_000252.

236. Propet sells a clog-like slip-on shoe for women called the “TravelBound.” Welch Dec. Ex. CB at (Propet Dec.) at 1; Welch Dec. Ex. CB at PROP_000102; PROP_000103; PROP_000172.

237. Propet Global Limited owns a registration for TRAVELTEK on the Principal Register, covering outsole of footwear and sold as a component of the footwear; outsole for footwear (Reg. No. 5,329,705). Welch Dec. Ex. CD.

J. There is No Likelihood of Confusion

238. Expert Jefferey A. Stec, Ph.D. (“Dr. Stec”) conducted a double-blind internet survey to determine whether customers and potential customers confuse Skechers’ Commute Time shoes as being sold by, sponsored or approved by, and/or having a business affiliation or connection to Easy Spirit. Welch Dec. Ex. CE (Stec Report) at pp. 6-7.

239. Dr. Stec developed an internet survey to accurately represent the marketplace in which relevant consumers shop for and purchase Skechers’ Commute Time shoes and Easy Spirit’s Traveltime shoes. Welch Dec. Ex. CE (Stec Report) at pg. 7.

240. Dr. Stec developed the internet survey to test whether there was likely to be confusion in the marketplace by Skechers' use of "Commute Time" as the name for certain of its shoes. Welch Dec. Ex. CE (Stec Report) at pg. 7.

241. Dr. Stec identified the target population for this survey as U.S. residents that are customers and potential customers of women's clog shoes. Welch Dec. Ex. CE (Stec Report) at pg. 7.

242. Skechers' Commute Time shoes and Easy Spirit's Traveltime shoes are both offered to the target market of purchasers of women's shoes. Welch Dec. Ex. K (DeZao Depo. Tr.) at 149:6-9; Baruch Dec. at ¶ 23.

243. Easy Spirit's average customer is an adult woman with a college degree. Welch Dec. Ex. CF at ESNY_036233, ESNY_036235.

244. The survey members were only qualified to participate if they indicated that they are 18 years old or older, they do not suffer from color blindness, and in the last 12 months, they personally had shopped for or purchased women's clogs and/or in the next 12 months, they plan to shop for or purchase women's clogs. Welch Dec. Ex. CE (Stec Report) at pg. 8.

245. Dr. Stec determined that there is insufficient evidence to show that Skechers' use of Commute Time is likely to cause confusion in the marketplace. Stec Report at pg. 4.

246. Controlling for pre-existing beliefs, guesses, and other background noise that respondents may bring to the survey, 0.0% of respondents in Dr. Stec's likelihood of confusion survey believed Easy Spirit was the source of the Skechers' Commute Time shoes. Welch Dec. Ex. CE (Stec Report) at pg. 4, pg. 25; Welch Dec. Ex. CE (Stec Report) at Ex. 4.0.

247. 0.0% of Dr. Stec's survey respondents believed Easy Spirit sponsored or approved Skechers' Commute Time. Welch Dec. Ex. CE (Stec Report) at pg. 4, pg. 26; Welch Dec. Ex. CE (Stec Report) at Ex. 4.0.

248. 0.0% of Dr. Stec's survey respondents believed there was a business affiliation or connection between Skechers' Commute Time shoes and Easy Spirit. Welch Dec. Ex. CE (Stec Report) at pg. 4, pg. 27; Welch Dec. Ex. CE (Stec Report) at Ex. 4.0.

249. Dr. Stec determined the results of the likelihood of confusion survey demonstrate that customers and potential customers of Skechers' Commute Time shoes are not confused, mistaken, or deceived about Easy Spirit being the source or origin of Skechers' Commute Time shoes, about Easy Spirit sponsoring or approving Skechers' Commute Time shoes, or about Easy Spirit being affiliated with Skechers' Commute Time shoes. Welch Dec. Ex. CE (Stec Report) at pg. 4, pp. 25-27.

250. Easy Spirit did not provide any survey evidence on likelihood of confusion.

K. Actual Confusion

251. Easy Spirit has offered no evidence of any actual consumer confusion between its TRAVELTIME shoes and mark and Skechers' sale of shoes sold in connection with the mark COMMUTE TIME and associated shoe design. Welch Dec. Ex. CG at Response No. 5.

252. Skechers is aware of no instances of confusion between the two shoes. Baruch Dec. at ¶ 24.

K. Consumer Surveys On Secondary Meaning

253. Dr. Stec conducted a double-blind internet survey to determine whether customers and potential customers associate the Traveltime Trade Dress with one source. Welch Dec. Ex. CE (Stec Report) at pp. 27-28.

254. Dr. Stec identified the target population for this survey as U.S. residents that are customers and potential customers of women's clog shoes. Welch Dec. Ex. CE (Stec Report) at pg. 27.

255. Dr. Stec developed an internet survey to accurately represent the marketplace in which relevant consumers shop for and purchase Easy Spirit's Traveltime shoes. Welch Dec. Ex. CE (Stec Report) at pg. 28.

256. The survey members were only qualified to participate if they indicated that they are 18 years old or older, they do not suffer from color blindness, and in the last 12 months, they personally had shopped for or purchased women's clogs and/or in the next 12 months, they plan to shop for or purchase women's clogs. Welch Dec. Ex. CE (Stec Report) at pg. 28.

257. Controlling for pre-existing beliefs, guesses, and other background noise that respondents may bring to the survey, only 1.0% of respondents associated Easy Spirit's claimed Traveltime trade dress with a single source. Welch Dec. Ex. CE (Stec Report) at pg. 4, 38; Welch Dec. Ex. CE (Stec Report) at Ex. 11.0.

258. Easy Spirit has provided no consumer surveys on secondary meaning regarding the alleged Traveltime trade dress.

L. Easy Spirit's Sales Figures

259. Easy Spirit claims to have sold more than 11 million pairs of the Traveltime. Compl., Dkt. 1 at ¶ 12.

260. For the period from 2017 to 2019, Easy Spirit has provided sales records showing a total of [REDACTED] alleged Traveltime shoes sold. Welch Dec. Ex. CH.

261. This spreadsheet shows [REDACTED] sold in 2017. Welch Dec. Ex. CH; Welch Dec. Ex. N (Burris Depo Tr.) at 163:3-17, 167:16-20, 169:5-18.

262. This spreadsheet shows Easy Spirit sold [REDACTED] Traveltime shoes in Month 1 of 2018. Welch Dec. Ex. CH.

263. Easy Spirit has provided sales records from July 2010 to February 2020, showing only [REDACTED] alleged Traveltime units sold. Welch Dec. Ex. CI

264. Easy Spirit has provided a separate record from October 2011 through December 2017, showing alleged Traveltime sales of [REDACTED]. Welch Dec. Ex. CJ

265. ESNY_036878 was not created by an Easy Spirit employee, nor was it provided pursuant to a subpoena. Welch Dec. Ex. N (Burris Depo. Tr.) at 442:9-444:16; 448:8-12. Mr. Burris was unable to testify as to the system used to create the spreadsheet or corroborate the underlying data. Welch Dec. Ex. N (Burris Depo. Tr.) at 447:8-449:10.

266. Other Easy Spirit witnesses acknowledged that they were unable to access sales figures from prior to 2017. Welch Dec. Ex. K (DeZao Depo Tr.) at 71:16-73:3.

M. Easy Spirit's Media Coverage

267. Easy Spirit has produced thirty-six articles from third parties regarding the Traveltime. *See, e.g.* Welch Dec. Ex. CK at ESNY_000618-ESNY_000619; Welch Dec. Ex. CL at ESNY_033474-ESNY_033476.

268. Of these thirty-six articles, only four were published before Skechers launched its Skechers Commute shoe line in early 2018. Welch Dec. Ex. CM; Welch Dec. Ex. CN at ESNY_033837; Welch Dec. Ex. CO at ESNY_033519-ESNY_033520; Welch Dec. Ex. CP at ESNY_033447-ESNY_033448.

269. None of these four articles focus on or even mention any elements of Easy Spirit's claimed trade dress. Welch Dec. Ex. CM; Welch Dec. Ex. CN at ESNY_033837; Welch Dec.

Ex. CO at ESNY_033519-ESNY_033520; Welch Dec. Ex. CP at ESNY_033447-ESNY_033448.

270. All four third-party articles focus primarily on the comfort of the Traveltime shoes and their ability to easily slip on and off. Welch Dec. Ex. CM; Welch Dec. Ex. CN at ESNY_033837; Welch Dec. Ex. CO at ESNY_033519-ESNY_033520; Welch Dec. Ex. CP at ESNY_033447-ESNY_033448.

271. One article is part of a “Podiatry Shoe Review,” in which a podiatrist discusses recommended shoes for people with podiatric problems, titled, “Easy Spirit Traveltime – Comfort Shoe For People Who Have Difficulty Reaching Their Feet.” Welch Dec. Ex. CM.

272. The second article is titled, “Your votes are in: the 30 most comfortable shoes for teachers.” The section of the article that references the Traveltime is under a heading titled “Easy Spirit” and states, “Sneakers are great, but if you want to pull off a more professional look with the same level of comfort (or more!) then Easy Sprit Traveltime mules and Zero Gravity shoes are a good bet.” Welch Dec. Ex. CN.

273. The title of the third article is “Top 10 Best Walking Shoes For Women In 2017 Reviewed.” Welch Dec. Ex. CO. The article describes the Traveltime as offering “wonderful foot comfort for any walking woman.” Welch Dec. Ex. CO at ESNY_033519.

274. The fourth article is titled “Best Shoes for Seniors,” and states that the Traveltime is comfortable and a “suitable choice” for people who have trouble bending over to tie their shoelaces. Welch Dec. Ex. CP at ESNY_033447.

275. The “Best Shoes for Seniors” article also highlights that the outsole is “excellent when you walk in rain and tile because of the good traction.” Welch Dec. Ex. CP at ESNY_033447.

276. Only one of these articles reference the appearance of the Traveltime at all. Welch Dec. Ex. CN.

277. The AW article, from approximately the Fall of 2015, states the Traveltime has a “professional” look, but likewise does not point to or identify any feature or element of the shoes’ midsole or outsole, or other trade dress elements. Welch Dec. Ex. CN at ESNY_033837.

278. The remaining thirty-one articles either bear no date to determine their relevancy or were published during 2019 or 2020. *See, e.g.* Welch Dec. Ex. CQ at ESNY_000519 (NurseTheory article download date Oct. 10, 2019); *see also* Welch Dec. Ex. CK at ESNY_000618-ESNY_000619 (BestShoesRated article dated Jan. 8, 2019); Welch Dec. Ex. CL at ESNY_033474-ESNY_033476 (Footwears Geek article dated Feb. 2, 2020).

N. Easy Spirit’s Advertising

279. Easy Spirit’s Rule 30(b)(6) designee on advertising and marketing issues, Shanya Perera, admitted that Easy Spirit cannot “provide an accurate number in distribution [of prior Traveltime advertisements] because we only have pieces of creative on our site as opposed to like a media or co-op plans.” Welch Dec. Ex. CR (Deposition Transcript of Shanya Perera (“Perera Depo. Tr.”)) at 107:24-108:16.

280. In relation to a previous Traveltime advertising campaign in 2006 or 2007, Easy Spirit cannot provide any data regarding to whom or where the previous Traveltime advertisements were distributed. Welch Dec. Ex. CR (Perera Depo. Tr.) at 104:20-109:6. Easy Spirit also cannot determine how much it spent on this campaign, the target market for this campaign, the research that went into creating the campaign, nor the value or sales that were generated from this campaign. Welch Dec. Ex. CR (Perera Depo. Tr.) at 109:11-14; 110:3-15.

281. Easy Spirit does not have “any access to media plans” for the Traveltime before 2017. Welch Dec. Ex. CR (Perera Depo. Tr.) at 134:2-136:8.

282. Easy Spirit does not have any data as to how many mailers were sent out for the Traveltime shoe before 2017. Welch Dec. Ex. CR (Perera Depo. Tr.) at 139:14-22.

283. Easy Spirit does not “have any information from back when [prior owners of the Easy Spirit brand] were doing the marketing of this.” Welch Dec. Ex. CR (Perera Depo. Tr.) at 144:9-24; 147:18-148:1 (referring to marketing of Traveltime through print advertisements).

284. Easy Spirit currently does not track how much money is spent on the Traveltime platform of Traveltime family marketing and advertising expenses, for promotions such as emails, and there is no way for Easy Spirit to delineate within Easy Spirit brand level expenses how much cost went into advertising the Traveltime family of shoes. Welch Dec. Ex. CR (Perera Depo. Tr.) at 120:25-124:9.

285. Easy Spirit has no data showing how much was spent on recent online advertising campaigns for the Traveltime family. Welch Dec. Ex. CR (Perera Depo. Tr.) at 221:12-19.

286. Easy Spirit no longer does print advertising, other than in the magazine, Footwear News. Welch Dec. Ex. CR (Perera Depo. Tr.) at 146:15-147:2.

287. Easy Spirit’s sole claimed advertising expenses designated to “TRAVELTIME COSTS” from [REDACTED]
[REDACTED] Welch Dec. Ex. CS.

288. Easy Spirit’s own vendors estimated Skechers’ advertising spend in [REDACTED]
[REDACTED] just in the United States. Welch Dec. Ex. CT at ESNY_033086.

289. Many of the provided Easy Spirit advertisements do not depict the claimed trade dress elements. *See, e.g.:*

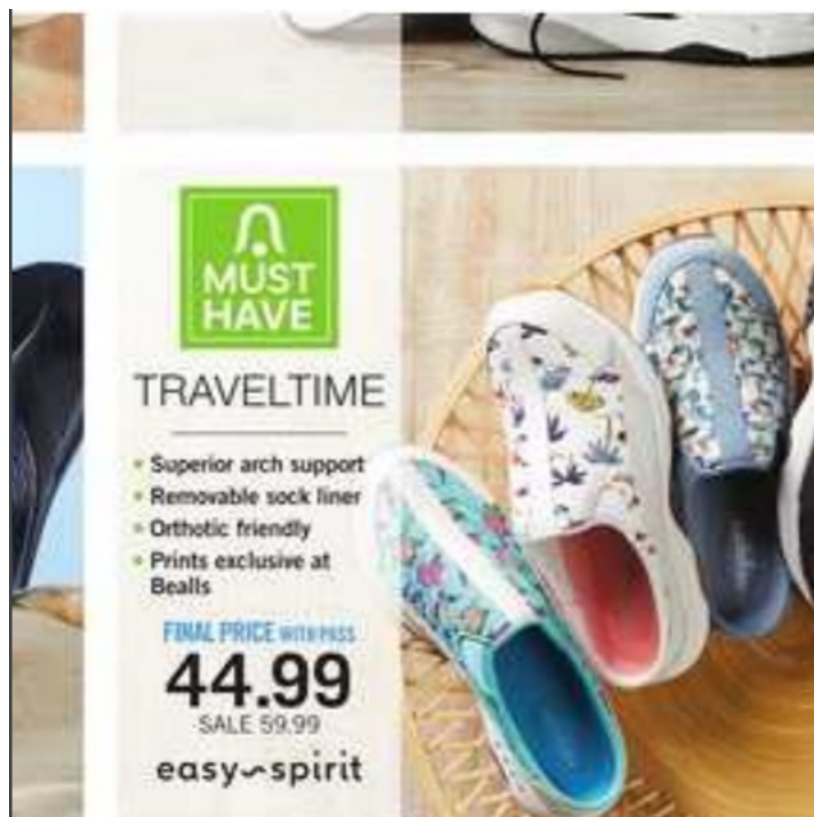
- Welch Dec. Ex. CU at ESNY_000001 (in which the claimed trade dress elements swirl midsole, break in the arch, indented lines on the midsole, and four circles on the midsole at the heel are not visible):



- Welch Dec. Ex. CU at ESNY_000031 (in which no details of the shoe – including the claimed trade dress elements, such as the swirl midsole, break in the arch, indented lines on the midsole, or four circles on the midsole at the heel – are visible):



- Welch Dec. Ex. CV (in which the claimed trade dress elements swirl midsole, break in the arch, and indented lines on the midsole are not visible):



- Welch Dec. Ex. CW (in which the claimed trade dress elements swirl midsole, break in the arch, indented lines on the midsole, and four circles on the midsole at the heel are not visible):



- Welch Dec. Ex. CX (showing Easy Spirit's "iconic style" but without depicting any of the claimed trade dress elements, such as the swirl midsole, break in the arch, indented lines on the midsole, or four circles on the midsole at the heel):

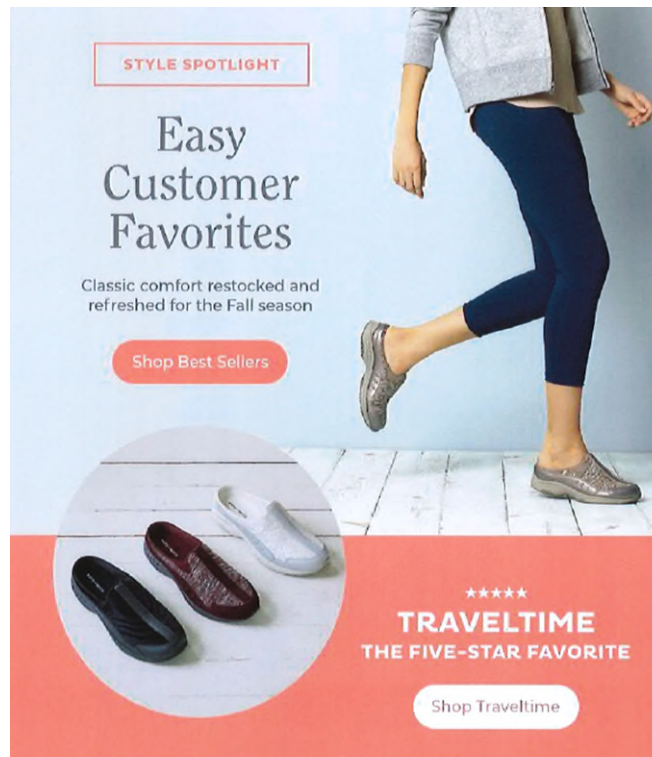


290. Many of the provided advertisements feature other source indicators such as the TRAVELTIME word mark or house mark EASY SPIRIT:

- Welch Dec. Ex. CU at ESNY_000001:



- Welch Dec. Ex. CU at ESNY_000007:



- Welch Dec. Ex. CU at ESNY_000036:



Respectfully submitted, this 20th day of August, 2020.

/s/ Robert L. Lee

Robert L. Lee (*Pro Hac Vice*)
Emily Chambers Welch (*Pro Hac Vice*)
Michelle W. Wilco (*Pro Hac Vice*)
ALSTON & BIRD LLP
1201 West Peachtree St. NW
Atlanta, GA 30309-3424
Tel: (404) 881-7000
Email: bob.lee@alston.com
Emily.welch@alston.com
Michelle.wilco@alston.com

Andrew J. Ligotti
ALSTON & BIRD LLP
90 Park Avenue
New York, New York 10016
Tel: (212) 210-1286
Email: andy.ligotti@alston.com

*Attorneys for Defendants Skechers U.S.A., Inc. and
Skechers U.S.A., Inc. II*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 20, 2020, a copy of the foregoing document was filed via this Court's electronic filing system and thereby served upon all counsel of record.

Date: August 20, 2020

/s/ Robert L. Lee

Robert L. Lee